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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BEMIS PENTECOSTAL CHURCH, *et al.*,
Appellants,

v.

STATE OF TENNESSEE, *et al.*,
Appellees.

On Appeal From The Judgment Of The Supreme Court Of The State Of Tennessee

APPELLANTS' BRIEF IN RESPONSE TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT

I. THE CONSTITUTIONALITY OF DISCLOSURE REQUIREMENTS IN REFERENDA IS NOT SETTLED LAW.

The appellees' motion to dismiss or affirm reveals the very reasons that this Court should grant plenary review of this case. Upon inspection, the appellees' attempts to show that the question of the constitutionality under the First Amendment of campaign financial disclosure laws in

referenda presented by this case is settled law ends up emphasizing how unsettled and important the question is.

The appellees cook up a muddled stew to show that the issue of the constitutionality of disclosure requirements in referenda campaigns has been clearly decided by implication, an argument that seems self-contradicting. They take selected facts from various cases to approximate the situation in this case, add a dash of reasoning from one case and generous helpings of dicta from others, and come to the conclusion that this case presents no substantial federal question. The appellees point to the disclosure requirements in the statute upheld in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and the fact that referenda were at issue in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), and *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981), and rely heavily on brief dicta contained in *Citizens Against Rent Control* and *Bellotti*. What they ignore is that the state interest recognized in *Buckley* and which the appellees specifically relied on below has been limited by this Court to candidate elections; that disclosure requirements were not at issue in *Citizens Against Rent Control* and *Bellotti;* and, that no compelling state interest was recognized in *Bellotti* or *Citizens Against Rent Control* as justifying any restriction on free speech in referenda.

In order to paper over some of the holes in their reasoning, the appellees now assert that the compelling state interest primarily served by the Tennessee Campaign Financial Disclosure Act of 1980 is informing the electorate of how referendum campaigns are financed. In the court below, the appellees repeatedly relied on the state interest of preventing corruption recognized in *Buckley*. They argued that even though there are no candidates to corrupt in a referendum, the process itself could be cor-

rupted. Informing the public of how referendum campaigns were financed was the chosen means to prevent this corruption. Now the state has elevated this means to a compelling interest in itself. Unfortunately for appellees, this Court has never recognized a state interest in informing the electorate as justifying restrictions on free speech during campaigns. In fact, the Court has specifically rejected as justification for campaign speech restrictions the interest of maintaining an informed electorate. *Brown* v. *Hartlage*, 456 U.S. 45 (1982), *accord Commonwealth* v. *Dennis*, 329 N.E.2d 706 (Mass. 1975). The fact, accurately pointed out by appellees, that the restrictions in those cases were of a different nature than the disclosure requirements here cannot by some reverse reasoning establish that this interest will justify disclosure requirements.

Finally, and most importantly, the appellees ignore the fact that the statute at issue here contains more than what appellees constantly characterize as "simple disclosure requirements." This statute operates as a prior restraint. Even the passage from *Buckley*, 424 U.S. at 81-82, cited by appellees in their motion (p. 11-12), recognizes that systems of prior restraint are harder to justify than disclosure requirements.

Appellees have attempted to portray the issue in this case as settled law by drawing parallels, analogies, and conclusions that not only are unsupported by this Court's precedents but represent an improper method of constitutional analysis.

> Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulartory interests with the individual's right to expression.

> "'[A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.'" *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 91 (1977), quoting *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). Performance of this task requires a particularized inquiry into the nature of the conflicting interests at stake here, beginning with a precise appraisal of the character of the ordinance as it affects communication.

Metromedia, Inc. v. *San Diego*, 453 U.S. 490, 502-503 (1981) (opinion of White, J.). Therefore, this Court's decision in cases involving other statutes with other types of restrictions cannot be relied upon as settling this case. It should be noted that the decisions in *Buckley, Bellotti*, and *Citizens Against Rent Control*, which the appellees argue have clearly decided the issue in this case, are the very decisions that the Tennessee Court of Appeals relied on to reach the opposite conclusion. To determine whether the burden on First Amendment rights imposed by the Tennessee statute is constitutional, a precise appraisal of the character of that ordinance, the interest purportedly served, and its effect on free speech is required.

II. A SUBSTANTIAL ISSUE PRESENTED IN THIS CASE IS THE CONSTITUTIONALITY OF THE APPLICATION TO CHURCHES OF A CAMPAIGN DISCLOSURE LAW THAT ACTS AS A PRIOR RESTRAINT.

The appellees also assert that the appellants have not presented any substantial question regarding the application of the Act to nonpolitical groups and churches in particular. The main thrust of their argument is based on *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981), and the notion that some

principle of fairness requires applying the Act to all organizations. This argument reverses the normal requirement that the state must prove the necessity of a broad application of an act restrictive of First Amendment rights and places the burden on appellants to prove an exemption is required. As stated in the appellants' Jurisdictional Statement, broad application of campaign registration and disclosure acts to nonpolitical groups has been rejected by lower federal courts. *New York Civil Liberties Union* v. *Acito*, 459 F.Supp. 75 (S.D. N.Y. 1978); *American Civil Liberties Union* v. *Jennings*, 366 F.Supp. 1041 (D. D.C. 1973), *vacated as moot sum nom Staats* v. *ACLU*, 422 U.S. 1030 (1975); *United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).

Appellees' attempt to distinguish *National Committee for Impeachment* and *Jennings* by saying that those decisions turned on the nature of the statements made (i.e., whether or not they were outcome specific) rather than the nature of the orgnizations making those statements, is simply not an accurate characterization of those decisions. Appellees cite *Iowans for Tax Relief* v. *The Campaign Finance Disclosure Commission*, 331 N.W.2d 862 (Iowa), *appeal dismissed*, 464 U.S. 879 (1983), for the proposition that this Court has already determined that application of campaign financial disclosure requirements to organizations not created for the support or defeat of candidates or ballot issues presents no substantial federal question. That case does not support such a proposition.

The Iowa law involved in that case limited the definition of political committees to organizations "organized for the purpose of accepting contributions, making expenditures, or incurring indebtedness . . . for the purpose of supporting or opposing a candidate for public office or

ballot measure." 331 N.W.2d at 864. The appellant in *Iowans for Tax Relief* amended its articles of incorporation to show a corporate purpose of promoting the passage of a particular ballot measure. *Id.* at 865. It was this articulated corporate purpose that brought the appellant within the scope of the Act. *Id.* at 866.

The issue presented in this case, application of the Tennessee Act to churches, is significantly different, in a constitutional sense, from application of the Iowa law to a group whose primary function is lobbying and whose corporate charter reflects a purpose to win passage of a particular ballot measure. Further, the questions presented, as framed in the Jurisdictional Statement filed in this Court, did not present the issue to this Court as it is presented by this case. The only question presented in *Iowans for Tax Relief* regarding the nature of the organizations subject to the Iowa Act read as follows:

> Whether the requirement that a nonpartisan organization of continuous existence file detailed reports every 30 days following an election until the organization is dissolved is an unconstitutional burden on associational rights of permanent organizations?

(Jurisdictional Statement filed in *Iowans for Tax Relief* v. *The Campaign Finance Disclosure Committee*, No. 83-101, at 4).

Appellees' citation to *Meese* v. *Kenne*, ___ U.S. ___, 107 S.Ct. 1862 (1987), and the accompanying argument trivializes the appellants' objections to the Tennessee Act. Their objections are not based upon the pejorative connotations of the word "political." Rather, they object to registering with the state as a precondition to exercising their right to address moral and ethical issues in the public forum. Further, to classify churches as political campaign committee distorts their religious role in the

eyes of those to whom they seek to minister. Such a state-imposed restriction on appellants' ministry has had the effect of chilling their free exercise of religion and would draw churches into entangling subservience to government (Tr 15, 66-67; *see* also Exhibit 7; App. p. 57a). Appellants' objections are theologically based (Tr 42, 111), thus impacting on their First Amendment rights.

III. WHETHER ACTUAL PROOF OF THE STATE'S INTEREST IS NECESSARY IS A QUESTION OF SUBSTANTIAL CONSTITUTIONAL MAGNITUDE.

Appellees argue that appellants will become intermediaries for funneling large contributions from those wishing to avoid the Act (Motion to Dismiss or Affirm, p. 19) and accuse the appellants of ignoring the conclusions of the Tennessee Supreme Court regarding the justifictation for the Act's requirements (Motion to Dismiss or Affirm, p. 26). It is not that appellants ignore the Tennessee Supreme Court's conclusions, it is just that those conclusions are unsupported by the record, as is appellees' argument that appellants act as some sort of intermediaries. Appellees do not seem bothered by this lack of record support. They end their motion by stating that there is "no necessity of putting on proof" of the compelling state interest asserted.

Once again, appellees misunderstand the nature of constitutional litigation.

> "In general, constitutional litigation demands fact analysis of the most particularized kind." Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 75. In the First Amendment area especially, the Supreme Court has stressed the need for "a particularized inquiry into the nature of the interests at stake." *Metromedia*, 453 U.S. at 503. It is questionable whether "assumtions and widely-held

beliefs" have a role to play in such an analysis.

New Jersey Citizens Action v. *Edison Township*, 797 F.2d 1250 (3d Cir. 1986), *cert. denied sub nom Piscataway Township* v. *New Jersey Citizen Action*, 107 S.Ct. 1336 (1987).

CONCLUSION

The issues presented by this case are substantial and unsettled questions of federal constitutional law. They affect the most fundamental constitutional rights of appellants and should be decided after plenary review by this Court.

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